

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 403 OF 2021

(Arising from Land Appeal No. 202 of 2020)

LIZE NATHAN MWANKUSYEAPPLICANT

VERSUS

CRDB BANK PLC.....1ST RESPONDENT

COMRADE AUCTION MART &

COURT BROKERS.....2ND RESPONDENT

Date of Last Order: 19.08.2022

Date of Ruling: 05.09.2022

RULING

V.L. MAKANI, J.

The applicant herein is seeking for leave to appeal to the Court of Appeal in respect of the judgment of this court in Land Appeal No. 202 of 2020 (Hon. Karayemaha, J).

The application is made under section 47(2) of the Land Disputes Court Act CAP 216 RE 2019 and is supported by the affidavit of Anthony Fissoo, Advocate for the applicant. In opposition of application the respondent the 1st respondent has filed a counter affidavit sworn by Janette Njombe, Advocate. The matter proceeded

ex-parte against the 2nd respondent who has never entered appearance.

Hearing of the application proceeded orally. Mr. Fissoo for the applicant prayed to adopt the contents of the Chamber Summons and the supporting affidavit. He said this court has discretionary powers to give leave to appeal to the Court of Appeal. He said leave is granted where the proposed issues for consideration and determination raise points of law, facts or mixed law and facts. He relied on the case of **Bulyanhulu Gold Mine Limited & 2 Others vs. Petrollube (T) Limited & Another, Civil Application No. 364/16 of 2017 (CAT-DSM)** (unreported). He said there are two issues raised which are considered to be worthy the intervention of the Court of Appeal namely:

- 1. Whether or not when the trial Tribunal failed to record and adjudicate on the core issue can the appellate court adjudicate it?*
- 2. Whether or not the Bank defaulter has the right to know the exact amount the Bank is entitled to recover.*

He said the determination of the issues is the exclusive domain of the Court of Appeal after leave is granted. He said the issues raised are not vexatious or useless but are worthy to be considered by the Court

of Appeal. He said the 1st respondent in her counter affidavit has disputed that those points are not points of law and were not part of the grounds of appeal, however, Mr. Fissoo said when arguing the issue whether there was a dispute in the calculation for interest was considered by the Judge and a finding was made. He thus said it was not correct to state that the points raised were not part and parcel of the grounds of appeal that were raised.

As for the second issue, Mr. Fissoo said it is more serious because the core intention was to know how much the Bank was to recover. He said this was not clear before the Tribunal and also by the High Court. He therefore emphasized that the points are worthy consideration by the Court of Appeal. He prayed for the application to be granted.

Mr. Mahembega and Ms. Jannette Njombe represented the 1st respondent and in his submissions Mr. Mahembega prayed to adopt the contents of the counter-affidavit that was sworn by Janette Njombe. He said grant of leave is pegged on the ability by the applicant to show that there are points of law or facts decided by the High Court that need the Court of Appeal's attention before the rights of the parties are adjudicated. He said leave is not automatic, but it

is after the applicant showing that the intended appeal has merit and contain grounds/issues revealing disturbing features to warrant the intervention of the Court of Appeal. He relied on the case of **Safari Mwazembe vs. Juma Fundisha, Civil Application No. 503/06 of 2021 (CAT-Mbeya)(unreported)** and **Haban Mosi & Another vs. Omar Hilal Seif & Another [2000] TLR 405 (CAT)**. He said the affidavit supporting the application does not raise grounds of merit which require the attention of the Court of Appeal. He said this is so because the said grounds partly raise new issues which cannot be entertained on appeal and partly issues which were adequately decided by this court during the appeal. He thus said there is no fundamental issue of importance which requires the grant of leave to appeal to the Court of Appeal.

On her side Ms. Njombe said the points for consideration by the Court of Appeal are set out in the affidavit at paragraphs 7(1) and (2). She said this is a new issue as set out in paragraph 10 of the counter-affidavit. She said Counsel for the applicant relied on High Court's judgment at page 6 where the Judge disagreed that there was unclear formula. She said had the applicant framed the issue to be whether the appellate court erred in finding that the formula was well known

to the appellant then it would have fallen within the ambit of the appeal. She said the applicant is however inviting the Court of Appeal to examine whether the appellate court formed a new issue which is different to whether there was a formula and whether it was known.

She said on the first point of the reliance of the formula this was clearly decided by this court. Ms. Njombe said in the judgment of this court the Judge pointed out that the applicant did not cross-examine or negate the amount that was tendered as such she was aware of the amount. As for the second point she submitted that the issue lacks merit as the amount claimed was known to the applicant as appearing in **Exhibits D5 and D6**. She said the point does not raise a serious issue to be examined by the Court of Appeal. She said the applicant has not satisfied the conditions for grant of leave to appeal as the points raised are not serious issues to be determined by the Court of Appeal. She relied on the case of **BBC vs. Eric Ng'maryo, Civil Application No. 138 of 2004 (CAT-DSM)** (unreported).

In rejoinder Mr. Fissoo said the application is for leave to appeal to the Court of Appeal and at this stage the court cannot determine whether the points raised have merit or not. He said the court is not

sitting as the Court of Appeal, so it cannot rule on the findings of the appellate court or the trial Tribunal. He said the case of **Safari Mazembe** (supra) is distinguishable because the present points raised have not been determined as opposed in the points in the cited case which were not determined in the lower courts. He said the issue of success of the appeal is no longer law as was said in the case of **Bulyankhulu Gold Mine Limited** (supra). He prayed for the application to be granted.

I have listened to the rival submissions by learned Advocates and I have also gone through the affidavit and counter-affidavit filed by the parties. The issue for consideration is whether the application at hand has merit.

Counsel for the parties agree in principle that the guiding conditions for the grant of leave to appeal to the Court of Appeal. These conditions were well illustrated in the case of **Harban Haji Mosi & Another vs. Omar Hilal Seif & Another, Civil Reference No. 19 of 1997 (CAT)** (unreported), in where it was held:

"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as a whole reveals such

disturbing feature as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the spectre of un-meriting matters and to enable it to give adequate attention to cases of true public importance"

Similarly, in **British Broadcasting Cooperation** (supra) it was held:

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant or refuse leave. The discretion must, however, be judiciously exercised on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal (see: **Buckle v Holmes** (1926) ALL E.R. Rep. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted".*

Further, in the case of **Balinangwe Mwambungu vs. Mohamed Hamisi, Civil Application No. 481/17 of 2000 (CAT-DSM)**

(unreported) the Court of Appeal had this to say:

"... there is no doubt that grant of leave is not automatic, but conditional, in that it can only be granted where the grounds of the intended appeal raise arguable issues in the appeal before the Court."

From the authorities above, it is apparent that when granting leave to appeal, the court before which an application for leave to appeal has been filed has the discretion to grant the leave or refuse it. However, that discretion must be judiciously exercised and the court in so doing must consider the facts before it. In order for the court to

exercise its discretionary powers the applicant must prove to the court that:

- 1. That the intended appeal raises issues of general importance or novel point of law*
- 2. That the grounds show a prima facie or arguable Appeal*
- 3. That the grounds are not frivolous, vexatious, useless, or hypothetical*
- 4. That the appeal stands a reasonable chances of success*
- 5. That the proceedings reveal the disturbing features which require the guidance of the Court of Appeal.*

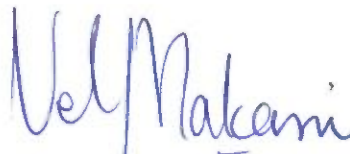
These facts must be shown by the applicant both in his affidavit and the submissions in support of the application. Further, the weaknesses moving him to appeal must be clearly seen in the proceedings and the decision subject of the appeal.

Now, has the applicant satisfied the conditions elaborated in the above cited authorities? Looking at the affidavit in support of the application, the issues which require intervention of the Court of Appeal are enumerated in paragraphs 7(1) to (2) of the affidavit. I agree with Ms. Njombe that the first issue which the applicant wants the Court of Appeal to intervene was not discussed in the High Court. According to the case of **Safari Mwazembe** (supra) the Court of Appeal will look into matters which came in the lower court and were

decided but not matters which were neither raised nor decided either by the trial court or the High Court. In that respect this point which have not been determined at the High Court would not be worthy the intervention of the Court of Appeal. As for the second point I have noted that it was well canvassed by the High Court, and in my considered view, this point too would not require the examination by the Court of Appeal.

For the reasons above, I find nothing controversial in the judgment of Land Appeal No.202 of 2020 to warrant the intervention of the Court of Appeal. The application is thus dismissed for want of merit. Considering that this application is a matter of the law, the applicant shall not be condemned to pay costs. Consequently, each party shall bear own costs.

It is so ordered.



V.L. MAKANI
JUDGE
05/09/2022